Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment	)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost	)	
of Broadband Deployment by Improving	)	
Policies Regarding Public Rights of Way and	)	
Wireless Facilities Siting	)	

REPLY COMMENTS OF THE NORTH COUNTY TRANSIT DISTRICT

Reed Caldwell
Director of Real Estate Development & Property Management
North County Transit District

SUMMARY

The North County Transit District, a California special district, files these reply comments in the above-captioned proceeding. Contrary to any implications in the industry's comments, the Commission may not and should not interfere with the District's control of its property.

The industry's opening comments illustrate the troubling breadth of the Commission's inquiry here. The comments ask the Commission to require access to publicly-owned property at federally regulated rates, and in accordance with Commission-dictated processes and timetables—and they do so while recognizing few or no limiting principles on the FCC's authority. North County Transit District, a California transit district, files these reply comments to show that the industry's requests seek relief that the agency cannot lawfully grant; defy basic market principles; and are likely to deter rather than encourage broadband deployment.

While the District's primary mission is to provide transit service—it currently moves over 12 million people annually—the District also leases and licenses space on certain parts of its property to wireless communications service providers at market-based rates. The District does so by entering into leases/licenses that establish how these entities may use NCTD's property. These are proprietary, not regulatory leases/licenses that are indistinguishable in critical respects from private contracts for access to privately-owned property. The leases/licenses must consider, among other things, safety and security risks associated with allowing third parties to access critical infrastructure. These agreements are necessarily ancillary to the District's duty to provide transit service.

The Commission cannot and should not interfere with the District's basic property rights. Any Commission efforts to do so—or any action that calls into question the enforceability of

existing, voluntarily-negotiated agreements—could obstruct the District's operations, increase public safety risks, and undermine a system that is promoting broadband deployment. This would leave entities like the District with little choice but to avoid leasing/licensing altogether.

TABLE OF CONTENTS

Page

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment	)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost	)	
of Broadband Deployment by Improving	)	
Policies Regarding Public Rights of Way and	)	
Wireless Facilities Siting	)	

REPLY COMMENTS OF THE NORTH COUNTY TRANSIT DISTRICT

The North County Transit District, a California special district, files these reply comments in the above-captioned proceeding. Contrary to any implications in the industry's comments, the Commission may not and should not interfere with the District's control of its property.

I. BACKGROUND

A. North County Transit District

North County Transit District's services are a vital part of San Diego's regional transportation network. NCTD moves more than 12 million passengers annually by providing public transportation for North San Diego County. Its family of transit services includes: the BREEZE bus system, the COASTER community rail service, LIFT paratransit, and the SPRINTER light rail line. Its property includes railroad rights-of-way, administration facilities, maintenance yards and facilities, and excess property owned in fee.

While the District is a governmental entity, it is not like a Home Rule municipality, which has broad authority to regulate land use, and to exercise the police power. Rather, the District has those powers specifically granted by California law and those powers necessarily

implied from the specific grants. Under California law, the District "may contract . . . with any person upon such terms and conditions as the district finds is in its best interest."[1] The District "may license, mortgage, sell, or otherwise dispose of any real or personal property within or without its area of jurisdiction necessary to the full or convenient exercise of its powers.[2] It has certain police powers with respect to persons entering onto its property (disruptive passengers, for example), but it does not exercise regulatory authority over telecommunications facilities placed on its property.

Many of the District's properties where broadband facilities would be placed are within the District's federally-regulated railroad right-of-way. The District's two railroad corridors—the San Diego Subdivision and the Escondido Subdivision—form the bulk of the District's real estate assets, and are subject to Federal Railroad Administration safety regulations and to the ultimate jurisdiction of the Surface Transportation Board pursuant to the Interstate Commerce Commission Termination Act of 1995. The District must comply with the specific use and safety regulations of these governing federal agencies for any entity or user that seeks to access or use District railroad property.

To maximize the use of the District's facilities for beneficial purposes while complying with these regulations, the District leases and licenses the use of certain of its property to wireless communications service providers through a Right-of-Entry and License process. The District uses funds that it collects through this process to lower customer rates or to improve and maintain infrastructure. The District's goal is neither to encourage nor to discourage broadband deployment, but to make the best use of its property for public purposes without impairing its

[1] Cal Pub. Util. Code § 125222.

[2] Cal Pub. Util. Code § 125240.

transit and railroad operations. Accordingly, the District uses a fairly standard encroachment permit process.[3] It is critical that any non-transit uses of the District's property not disrupt or create interference with the District's operations, or violate applicable federal safety regulations.[4]

This is particularly important because the District's property was acquired at great expense and is highly valuable. Using generally accepted accounting principles for government agencies, the District's rights-of-way were valued at over $350 Million at the end of 2010.[5] The District owns and/or controls approximately 60 miles of right-of-way along its main line, and about 22 miles of right-of-way along its Escondido line. This translates to about $4,200,000 per mile in land value (about $700 per foot), not including costs incurred each year in maintenance, improvements, and securing the property. The Commission is no doubt well aware that mass transit facilities serve vital environmental and social functions, and that Federal and State funding for facilities is at risk. Since the District does not have a general taxing authority in the same way that the State does, it is critical that it obtain fair value for this property, particularly since it devoted substantial effort to acquiring and creating this right-of-way. If the District were to give this property away to telecommunications providers for free, or for cost, rather than fair market value, the Commission would effectively be transferring wealth from the District (and its

---

[3] *See* North County Transit District Encroachment Permit Application Process, attached as Exhibit A hereto. As a general matter, the District requires a permit to visit, traverse, work on, or build upon its rail corridor. If an entity seeks to install or construct permanent facilities on District property, it must execute a license or lease.

[4] The District's property is used by certain wireline providers as a result of a different arrangement. The District acquired its property subject to certain pre-existing rights held by MCI Telecommunications Corporation and Metropolitan Fiber System of Los Angeles. Any new wireline providers would have to obtain and pay for rights to use the District's property.

[5] North County Transit District Comprehensive Annual Financial Report (for the fiscal year ended June 30, 2010), at 21, *available at*: http://www.gonctd.com/userfiles/file/CAFR%20FY%202010%20-%20NCTD%20v2_0.pdf

riders) to the providers.[6] It is not necessary, appropriate, or lawful to do so.

B. The Commission's Acceleration of Broadband Deployment Notice of Inquiry.

The Commission inquires about State and local entities' wireless facilities siting practices to determine whether federal regulation is necessary to accelerate broadband deployment.[7] Specifically, the Commission asked "whether there is a need for coordinated national action to improve . . . wireless facilities siting polices,"[8] and it requested information about the attachments to a range of facilities including "utility poles, water towers, billboards, and buildings, as well as to communications towers, both within and outside of established rights of way."[9] The Commission did not only ask about local regulatory actions; it also raised questions that go directly to the control of property that government agencies own and operate in a proprietary capacity. For example, the Commission suggested that "fragmented property ownership creates a patchwork of requirements" that providers must satisfy on a piecemeal basis.[10] The Commission inquired whether "'market based' rates for use of . . . publicly-owed

---

[6] Some telecommunications providers argue that it is very expensive to try to recreate long corridors such as those the District has created, and suggest that this is a reason why they should be allowed to use such property at a rate that does not reflect the corridor's value. Level 3, for example, argues that property should be priced as if there were many readily available alternatives, even if that is not the case. But such an approach would simply deprive the District of the value of its own efforts, and the actual value of its corridor. Such a regime would shift this value to the telecommunications provider, who would be free to transfer it to other companies by selling capacity, or to simply sell the property rights to other companies. This would create a strange world where, rather than deploy, providers would have an incentive to consolidate and resell assets.

[7] *In re Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, WC Docket No. 11-59, FCC 11-51 (Apr. 7, 2011) (the "NOI").

[8] NOI ¶ 9.

[9] NOI ¶ 3 n.6.

[10] NOI ¶ 4. Property rights are of course protected by the Fifth Amendment to the Federal Constitution, and this "fragment[ation]" necessarily follows from private land ownership (no

wireless facilities sites" are reasonable,[11] and whether processes should be "streamlined in certain situations, such as where an infrastructure provider seeks to collocate new facilities on an existing tower."[12] In response, among other things, the communications industry's opening comments urge the Commission to mandate collocation "by right,"[13] and to use the Communications Act to limit the fees that State and local entities can charge the communications industry for the use of their property.[14] The industry criticizes not only local regulation, but also prices charged by all types of public entities, including special districts.[15] The industry appears to suggest that it can directly attack, and the Commission can rewrite, contracts entered into years ago for use of publicly-owned property. Because the District has enormous interests in protecting its property and in providing for its use only through enforceable and predictable agreements, it files these comments in opposition.

II. DISCUSSION

A. The Commission Cannot Interfere With The District's Ability to Lease/License Its Property at Market-Based Rates.

The Commission may not use its authority under the Communications Act to interfere with the District's basic property rights, including its right to lease and/or license its property to

---

fragmentation would exist if the federal government owned all land). To base federal regulatory authority on the need to undo the "problem" created by essential Constitutional rights turns the notions of limited federal government powers and limited agency authority upside down.

[11] NOI ¶ 16.

[12] NOI ¶ 14.

[13] *See, e.g.,* Comments of PCIA—The Wireless Infrastructure Association and the DAS Forum (A Membership Section of PCIA), WC Docket No. 11-59 at 39 (July 18, 2011).

[14] *See, e.g.,* Comments of Level 3 Communications, LLC, WC Docket No. 11-59 (July 18, 2011) (urging the Commission to preempt the pricing terms of the contract that Level 3's predecessor-in-interest entered into with the New York State Thruway Authority).

[15] *Id.* (addressing policies of New York State Thruway Authority); Comments of CenturyLink, WC Docket No. 11-59 at 8 (July 18, 2011) (criticizing policies of Elephant Butte Irrigation District).

third-parties at market-based rates, or to undo existing agreements. Nor may the Commission regulate the manner in which the District leases/licenses its property, the terms of its agreements, or the speed with which it enters into such agreements. The Commission is limited by both statutory and constitutional principles.

First, the Commission long ago recognized that the Communications Act does not permit it to regulate entities like the District (or their property). It noted:

> The Communications Act confers broad and expansive powers upon this Commission to regulate "all forms of electrical communication, whether by telephone, telegraph, cable, or radio." However, this authority is "not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority." . . . 3(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.
>
> We recognize that the question of our jurisdiction over pole and conduit arrangements made available to cable operators is a difficult one. It is only after careful review of the situation that we have concluded that this activity does not constitute "communication by wire or radio," and is thus beyond the scope of our authority. . . .The fact that the cable operator utilizes the poles for his cable does not justify the extension of our authority over the pole owners as if they were "persons engaged in such communication or such transmission."[16]

The Commission emphasized that finding that it had broad authority to regulate property—including to set access and rents for antenna sites—would defy Congress' intent. According to the Commission, it

> would bring under the Act activities never intended by Congress to be regulated. The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. *If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for*

[16] *California Water and Tel. Co.*, 64 FCC 2d 753, 758-59 (1977)(internal citations omitted).

> *the laying of wire, or even access and rents for antenna sites.* Such a reading comes close to the "affecting communications" concept rejected by the Commission and the seventh circuit in *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (1972).[17]

None of the amendments to the Act since 1977 changes this analysis, or gives the Commission authority over the District or its property. The Commission's decision in *California Water* led Congress to adopt Section 224 of the Act.[18] While this section gives the Commission authority to regulate pole attachment rates in cases where a State does not regulate them, the section specifically reaches only "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." The Commission has recently reaffirmed that Section 224 gives it no "authority to regulate . . . utilities that are municipally or cooperatively owned."[19] In addition, Section 224(a) expressly and separately clarifies that it does not extend to "any railroad."[20] The Commission has also suggested that Section 706 of the Telecommunications Act of 1996 allows it regulate to promote broadband deployment, but the Commission's authority under this statute does not "extend beyond [its] subject matter jurisdiction under the Communications Act."[21] As the Commission has already found, it has no subject matter jurisdiction over property merely because it is useful for communications purposes. Because the Commission has no authority over a California special district's property management, nor over railroad property, Section 706 cannot apply—even if one assumes that the section grants the

---

[17] *Id.* (emphasis added).

[18] 47 U.S.C. § 224.

[19] *In re Implementation of Section 224 of the Act et al.*, 25 FCC Rcd. 11864, 11957 (2010).

[20] 47 U.S.C. § 224(a)(1).

[21] *In re Preserving the Open Internet*, Report and Order, FCC 10-201, GN Docket No. 09-191, WC Docket No. 07-52, at ¶ 121 (Dec. 23, 2010).

Commission any substantive authority.[22]

Neither Section 253 nor Section 332(c)(7)[23] gives the Commission control over the District. Section 253(a) states that "no State or local statute or regulation, or other State or local legal requirement" may prohibit or have the effect of prohibiting *the ability* of any entity to provide any interstate or intrastate telecommunications service. Section 253(d), then defines how and under what circumstances the Commission may enforce this provision: if, "after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement" of the statute, regulation or legal requirement "to the extent necessary" to correct the violation of subsection (a) or (b). That is, the Commission only has narrow *preemptive* authority under Section 253.[24] It is well-established that preemption applies only to "state regulation"—not proprietary—actions.[25] Courts have consistently recognized that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a state or municipality takes in a proprietary capacity—actions similar to those a private entity might take—and actions a state or municipality takes that are attempts to regulate. The former type of action is not subject to

---

[22] As the Commission is aware, there is substantial question as to whether the Commission may rely upon Section 706 as a source of regulatory authority. The Commission would be required to address these questions here should it choose to rely on the section to affect the District's property or contracts.

[23] 47 U.S.C. §§ 253, 332(c)(7).

[24] The Commission has no authority to decide cases that involve the safe harbor of Section 253(c).

[25] *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 219 (1993).

preemption while the latter is."[26] The Telecommunications Act is subject to this maxim, and accordingly, the "Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity."[27] Here, the District is not regulating at all. It is simply entering into agreements for use of its property. This sort of action is not and could not be subject to preemption under Section 253, and Section 253 cannot be stretched to give the Commission *regulatory* authority over the management or pricing of the property.

Section 332(c)(7), titled "preservation of zoning authority" likewise only restricts local regulatory decisions, and therefore gives the Commission no power over proprietary acts. Thus, Section 332(c)(7)(A) states that nothing in the Act may affect "decisions regarding the placement, construction, and modification of personal wireless service facilities," except as provided in Section 332(c)(7). The limitations on local authority are specified in Section 332(c)(7)(B), and those limitations only go to the "regulation of the placement, construction, and modification of personal wireless service facilities," not proprietary actions. In fact, the District has no zoning powers.

Nor may the Commission attempt to regulate the District in light of its governmental or quasi-governmental status on the ground that its actions in managing or leasing or licensing its property interferes with interstate commerce (by discouraging broadband deployment). Attempting to do so would raise serious issues under the Tenth Amendment, which forbids the

---

[26] *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000).

[27] *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002); *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 219 (1993) ("[P]re-emption doctrines apply only to state regulation").

federal government from regulating the States directly. The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. The Supreme Court has consistently respected this choice. Hence, even where Congress has the authority to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. "The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."[28] It follows that the Commission may not direct the States (or their instrumentalities) to enter into agreements at a time and under conditions that the Commission prefers.

B. Even if The Commission Had Authority To Do So, Interfering With the District's Property Rights Would Not Advance Broadband Development.

Even if the Commission had authority to interfere with the free market forces at work here (it does not), there is no defensible reason—and no practical way—to do so.

The District's driving purpose—its raison d'etre —is transit service. It moves more than 12 million passengers annually via its bus, commuter rail, paratransit, and light rail services. These are critical services in the community, and the District has very limited staff to provide those services. The District's property is already strictly regulated by the Federal Railroad Administration. Moreover, the District must strictly control access to its property, including its rights-of-way. Federal Railroad Administration data indicates that over the past 10 years, there have been over 4,000 deaths caused by trespasses onto railway property at non-highway crossings.[29] The District therefore must strictly control who may access its property, and how

---

[28] *New York v. United States*, 505 U.S. 144, 166 (1992).

[29] Federal Railway Administration, Office of Safety Analysis, data available at: http://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/tenyr2a.aspx

they may do so.[30] It is hard to imagine that the Commission could devise a set of federal rules that rationally balanced existing regulations and requirements, took into account the limited staff available to the District, and ensured that the District's highest purpose—reliable and safe transit service at reasonable rates—is served.[31] This is true both with respect to the initial placement of facilities and with respect to collocation, which in the context of the District's operations, raise similar, and perhaps more complex issues of security, facility accessibility, radio frequency interference with railroad signal and control operations, and maintenance risk.

Nor is there any good reason for the Commission to adopt federal regulations merely because the industry would prefer different terms and conditions for service. The District *is* leasing/licensing its property to providers, and has no incentive to deter broadband deployment. The Commission should not interfere with a model that is both promoting the deployment of wireless services and protecting the District and its customers. Instead, the Commission can most effectively encourage leasing and licensing by rejecting the regulatory approach urged by the telecommunications industry.

While the leasing/licensing of space for wireless telecommunications facilities boosts the District's general revenues, it is a purely ancillary activity, which cannot disrupt the District's primary purpose in any way. Improper installations could delay rail traffic throughout the area at enormous expense. In addition, for safety, operational, and other reasons, the District must limit

---

[30] Among other things, anyone accessing District property must be trained in railroad safety.

[31] To give a small example: if the Commission established deadlines for acting on requests for facilities access, the District would likely be required to hire a property manager and staff to license/license space and to monitor the ongoing use in anticipation of possible requests. Those costs would have to be recovered either from customers; the existing users; or via some other mechanism that the District would have to spend resources to develop. Any way one examines it, this activity, which may seem small to the Commission, would at worst increase rates, and at best create a significant distraction.

the number of facilities that can be placed at any site, and it must do so on a case-by-case basis. Each telecommunications facility added to District property (including collocated facilities) are accompanied by additional ground equipment, and additional personnel that must access the District's property. These equipment and personnel increase the risk of disruption to the District's principal work.[32] Moreover, the District has limited staff, and it is not in a position to dedicate personnel exclusively to the siting needs or ongoing requirements of telecommunications carriers.

The District, as noted above, is willing to lease/license access for fair market value. It has no interest in leasing/licensing its property in exchange for the recovery of its costs alone. Doing so would not benefit the District or its customers, and it would not adequately compensate the District for the burdens and risks that necessarily coincide with allowing third parties to use District property.[33] Similarly, even if the Commission *could* selectively preempt certain terms of the District's existing leases and licenses (including the price terms, as some entities have proposed),[34] it should not do so. The District must know, for example, that lessees/licensees will be obligated to comply with contractual terms that require those who enter railway property to pass basic safety training courses and work under the safety direction of railroad personnel; otherwise, trains and people would be put at risk. The District also cannot afford to litigate the enforceability of the price terms of its contracts; that would render the contracts illusory. If existing contractual terms are not enforceable, the District would face significant new risks and

---

[32] In addition, the District is itself highly dependent on wireless communications itself. It is installing advanced systems to control traffic that depend on highly reliable wireless communications. Consequently, it must ensure that licensees do not locate or operate facilities on District property in a manner that would interfere with critical transit-related operations.

[33] *See, infra.*

[34] *See, e.g.,* Comments of Level 3 Communications, LLC, WC Docket No. 11-59 (July 18, 2011)

be discouraged from leasing/licensing altogether.[35]

III. CONCLUSION

Contrary to the industry's suggestion, there is no need (or authority) for the Commission to regulate the terms and conditions of access to property owned by public agencies. Access is being provided now, and over-regulation would create security and other risks, and discourage entities like the District from opening their property to third parties. The Commission therefore may not and should not affect the District's ability to set market-based rates for use of its property, or to control how third parties use or access this property whether for initial placement or collocation.

Respectfully submitted,

Reed Caldwell

Reed Caldwell
Director of Real Estate Development & Property Management
North County Transit District

September 29, 2011

---

[35] It is worth stressing that the District's property is similar to structures and property owned by many private property owners. There is no basis for concluding that the absence of access rights would in fact discourage broadband deployment. In fact, a fair reading of some of the wireless industry's comments (as well as the Commission's own NOI) suggests that there are alternatives for placement of facilities – it would just be more convenient and cheaper if the Commission regulated terms and conditions for access to property owned by local agencies. Presumably, it would also "encourage deployment" if the Commission asserted control over every piece of private property – including the rooftops of private homes. This is not suggested because not even the wireless industry can suggest that the Commission has that authority. But the Act gives the Commission no more authority over the District's property than it provides over private homes.

EXHIBIT A

http://www.gonctd.com/userfiles/file/Permit%20Application(1).pdf